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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1466

DAVID E. RAHMING,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

~~ON~~ PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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BLEED THROUGH

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In the Supreme Court of the United States

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No. .....

DAVID E. RAHMING,
Appellant,

vs.

STATE OF FLORIDA,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner requests issuance of a Writ of Certiorari to the Florida Supreme Court and shows in support of this petition as follows:

JURISDICTION

Petitioner was convicted of the felony, robbery in the criminal court of record for Palm Beach County, Florida. Subsequent to his conviction Petitioner filed a motion to vacate and set aside his conviction on the ground that the public defender who represented him had inadequately investigated and prepared his case for trial. An evidentiary hearing was held in which the Circuit Court for Palm Beach County denied the motion to vacate. An appeal was taken to the Fourth District Court of Appeal, State of Florida, which affirmed (A-24). A timely petition for certiorari was filed in the Florida Supreme Court which was denied on March 13th, 1975 (A-25).

QUESTION PRESENTED FOR REVIEW

WHERE IMPORTANT ALIBI WITNESSES WERE NOT CONTACTED AND THE COURT FOUND AS A MATTER OF FACT THAT THERE WAS INADEQUATE PRE-TRIAL INVESTIGATION OF DEFENDANT'S CASE, THE COURT SHOULD HAVE SET ASIDE DEFENDANT'S CONVICTION AND ORDERED A NEW TRIAL.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution guarantees a defendant in a criminal case the right to counsel which is imposed on the States through the Fourteenth Amendment.

STATEMENT OF THE CASE

The Court which presided over the evidentiary hearing on the motion to vacate the conviction wrote a seventeen page order detailing the history of the case and setting forth the facts which comprised the evidence at the hearing on the motion for post-conviction relief (A-1-23). We do not take issue with the facts as found by the Circuit Court for Palm Beach County as they do accurately summarize the evidence contained in the transcript of the hearing.

PRETRIAL PREPARATION

After being charged with robbery and conspiracy to commit a felony, Defendant was adjudged insolvent and the public defender's office was appointed to represent him. At that time it was clear that the main defense of the Defendant was that he was in Alabama with a

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companion, Richard Haddox, on March 15, 1970, the date of this alleged crime in Palm Beach County (A-7-8). The investigator for the public defender's office called a Mrs. Gayle in Alabama (Haddox's aunt) but did not speak with her personally. Subsequently the public defender's office received information that Mrs. Gayle, with whom Defendant and Haddox had stayed in Alabama at or about the time this crime was committed, was ill and not willing to come to Florida to testify at the trial (A-8). No action was taken to perpetuate the testimony of Mrs. Gayle for trial (A-8).

EVIDENCE AT TRIAL

At the trial Richard Haddox testified that he and the Defendant left Palm Beach County on March 7th or 8th, 1970, arrived in Alabama where they stayed at the LaGrand Hotel, visited with Haddox's aunt, Mrs. Gayle, did some traveling outside of the State of Florida, and returned to Alabama during the early morning hours of March 15, 1970, again visiting Mrs. Gayle and staying at the LaGrand Hotel. Haddox could recall the dates because on March 16, 1970, he and the Defendant were arrested and confined to jail for one to two weeks in Alabama on another charge (A-9-10).

The other alibi witnesses at the trial were rather vague, only confirming that approximately one week prior to the crime the Defendant and Haddox left for Alabama and were in Alabama at various times during the month of March. None of the testimony was adequate to conclusively show Defendant was in Alabama at the time the crime was committed in Palm Beach County (A-9-11). The testimony of the Defendant was consistent with that of Haddox and confirmed that on March 16th he and Haddox were arrested in Alabama.

PROSECUTOR'S DOUBTS AS TO DEFENDANT'S GUILT

Assistant County Solicitor, Dan Hurley, who prosecuted the Defendant and secured a conviction, testified at the post-conviction hearing that it was "inconceivable" that depositions of the alibi witnesses in Alabama were not taken for use at this trial and because of his "lingering doubts" he filed a motion on behalf of the State for permission to take depositions of those witnesses in Alabama even after the trial and conviction. Mr. Hurley testified that in his opinion there was "woefully inadequate preparation" on behalf of the Defendant which denied him effective counsel. He testified that upon taking the deposition of Mrs. Gayle he found her to be "highly credible" and with her testimony Defendant's alibi would have been "far more substantial". As the case actually was presented to the jury, it was simply proven that the Defendant was arrested the next day in Alabama. Hurley's testimony culminated with the following statement:

> "There was no preparation with respect to alibi defense, and in my mind, there was simply no doubt that that would constitute ineffective assistance of counsel." (A-26)

EVIDENCE WHICH EXISTED BUT WASN'T UTILIZED BY DEFENSE COUNSEL

The investigator for the public defender's office who was working on this case testified at the post-conviction hearing that he was able to establish conclusively from his telephone conversation with an Alabama police officer that Defendant was in Alabama the day of the robbery in Palm Beach County, which allegedly occurred at 11:00 P.M. on March 15, 1970.

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The deposition of Mrs. Gayle which was taken after the trial and conviction showed that she would have testified that Defendant was in Mobile, Alabama from March 14 to March 17, 1970, with Richard Haddox and she was able to identify Defendant from photographs (A-11). In addition, there were other witnesses who placed Defendant in Alabama at the time of the crime in Palm Beach County. The manager of the LaGrand Hotel in Mobile testified on post-trial deposition that she had rented a room to Richard Haddox on March 15, 1970, and she also selected a picture of the Defendant from photographs as being a person familiar to her (A-11). The post-trial deposition of an Alabama Sheriff showed that Defendant was arrested at 2:25 P.M. on March 16, 1970, and was released approximately two weeks later (A-11). The post-trial deposition of Mrs. Gayle's husband showed that Haddox and a friend arrived at their house in Alabama on March 13, 1970 (A-12).

The Trial Court found at the post-trial evidentiary hearing that the public defender "with the meager information he had at his disposal" decided to proceed with the trial and not seek a continuance or try to perpetuate the testimony of Alabama witnesses (A-13). No attorney in the public defender's office ever talked to any of the witnesses in Alabama (A-13).

The Trial Court found on page 10 (A-14) of his order as follows:

> "The preparation prior to trial relating to the Alabama witnesses by defense counsel, except for Richard Haddox, was not adequate but the preparation prior to trial of the alibi witnesses other than those residing in Alabama was adequate and trial counsel's conduct during the trial was competent and thorough."

The Trial Court went on to find that the efforts of trial counsel during trial were not such as to reduce the trial to a farce or mockery of justice and denied the motion for post-conviction relief (A-1-23).

REASONS FOR ALLOWANCE OF WRIT

The basis of this petition is that the evidence as shown by the depositions of the alibi witnesses in Alabama and the evidence shown at the post-trial hearing make it clear that the Defendant had an excellent alibi since the testimony of Mrs. Gayle, her husband and the hotel manager in Alabama would have shown that he was in Alabama at the time this crime was committed. Except for the Defendant and Haddox, whose credibility was very much in question, the testimony of the witnesses who did testify at the trial concerning his whereabouts only showed that he was arrested in Alabama one day after the crime occurred in Palm Beach County. Because of his own doubts the prosecuting attorney asked the court for permission to take post-trial depositions. If they had been utilized at the trial they would have transformed the Defendant's case from an alibi based on vague testimony which really only showed that Defendant was arrested in Alabama the day after the crime in Palm Beach County, to a practically airtight defense based upon the testimony of a disinterested person, Mrs. Gayle, whom the prosecutor found to be "a highly credible woman", the hotel manager and others.

In holding that the motion for post-conviction relief was to be denied, the trial court recognized that "the preparation prior to trial relating to the Alabama witnesses * * * was not adequate". There is no real issue of fact which we wish to argue on this appeal, rather

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we are basing our case upon the findings of the trial court buttressed by the testimony of the witnesses as set forth above. We believe that once the trial court found the pretrial preparation to be inadequate it was incumbent upon him to find this Defendant was deprived of the effective representation of counsel.

In essence the trial court in the present case apparently decided that the inadequate pretrial preparation which he found occurred was not sufficient to set aside the conviction because the trial itself was conducted competently. There are a number of federal cases which have held that the effective assistance of counsel guaranteed under the Sixth Amendment includes effective pretrial preparation.

In *Johns* v. *Perini*, 462 F.2d 1308 (6th Cir. 1972), the actual conduct of the trial was not in issue, but only the pretrial preparation which failed to investigate the claimed alibi. The alibi was that the defendant was supposedly at work at the time the crime was committed elsewhere. Defense counsel made "no more than a cursory inquiry over the telephone of a person unidentified at the evidentiary hearing" (p. 1314), and did no further investigation of the alibi defense. The trial court had denied the motion for post-conviction relief and the court of appeals reversed, holding that the failure to investigate the alibi could not be dismissed as harmless and that the petitioner was deprived of his constitutional right to the effective assistance of counsel.

The factual situation in the present case is almost identical, where the investigator for the public defender's office made a telephone call to Mrs. Gayle in Alabama, did not personally speak with her, and upon being advised that she was ill and not willing to attend the trial, de-

fense counsel made no further effort to utilize her testimony or inquire as to other witnesses which were available in Alabama.

A similar factual situation was presented in *Cross* v. *United States*, 392 F.2d 360 (8th Cir. 1968), wherein again an inadequate pretrial preparation and the failure to subpoena a witness resulted in an alibi defense not being adequately presented. In reversing a denial of post-conviction relief, the court stated on page 367:

> "The trial was certainly not a sham or a mockery of justice and in fact was probably, as Judge Young noted, the best tried criminal case of that term.
>
> However, as stated in Glasser, supra, 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' 315 U.S. at 76, 62 S.Ct. at 467. In view of Howard's own statement that his willful neglect of duty resulted in Cross's case not being investigated or developed, we hesitate to say on the record before us that no prejudice resulted to Cross and that he had the effective assistance of counsel."

As the court stated in *Hollingshead* v. *Wainwright*, 423 F.2d 1059 (5th Cir. 1970), on page 1060:

> "Effectiveness of counsel is not tested merely by counsel's performance in the courtroom but must also be measured by the attorney's familiarity with the facts and the law of the case. See Caraway v. Beto, 5 Cir. 1970, 421 F.2d 636; Roberts v. Dutton, 5 Cir. 1966, 368 F.2d 465."

See also *Goodwin* v. *Swenson*, 287 F. Supp. 166 (U.S.D.C. W.D. Mo. 1968).

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The trial court found that although the preparation in the present case was inadequate, it did not go so far as to make the trial of this case a "farce and mockery". This is a terminology which has often been loosely used by the courts in the past. We do not believe that those words are to be taken literally. In *Scott* v. *United States*, 427 F.2d 609 (D.C. Cir. 1970), the court referred to "farce and mockery" on page 610 as follows:

> "That standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness. Bruce v. United States, 126 U.S. App. D.C. 336, 339, 379 F.2d 113, 116 (1967). The 'farce and mockery' standard derives from some older doctrine on the content of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. Compare, for example, United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) with Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The appropriate standard for ineffective assistance of counsel, set forth in Bruce, supra, is whether gross incompetence blotted out the essence of a substantial defense."

In the present case the Defendant was tried for a crime which was committed in Palm Beach County, Florida, at a time when he testified he was in Alabama. There were no witnesses at the trial other than his friend and companion, Richard Haddox, who bolstered Defendant's story. Because of the almost total lack of preparation for this trial and the failure to investigate this alibi, it was not until after the trial that it became known that disinterested third persons who were residents of Ala-

bama would have testified that the Defendant was in Alabama at the time this crime was committed. What could be more indicative of counsel's effectiveness in this case than the fact that it was the prosecuting attorney, not defense counsel, who instituted post-trial discovery because he had "lingering doubts" about the Defendant's guilt? If it had not been for the conscience of the prosecutor and his diligence in pursuing this, Mrs. Gayle and the other witnesses' alibi testimony would never have been revealed. We submit that you cannot separate adequate pretrial preparation and effective representation during trial. They are inextricably intertwined and a reasonable defense includes both of these requirements. The trial court having found that the pretrial preparation and investigation was inadequate, it thus follows that the Defendant was denied an effective defense and the petition for certiorari should be granted.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that copy of the foregoing has been furnished by mail this 2nd day of May, 1975, to Office of Attorney General, 225 Pan American Building, West Palm Beach, Florida and to the Office of State Attorney, Palm Beach County Courthouse, West Palm Beach, Florida.

LARRY KLEIN

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APPENDIX

IN THE
CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA—CRIMINAL DIVISION

CASE NO. 70 C 441

STATE OF FLORIDA,

vs.

DAVID E. RAHMING,
Defendant.

ORDER DENYING MOTION FOR POST-CONVICTION RELIEF

(Filed April 12, 1973)

In the above styled cause the defendant, David E. Rahming, was charged with the offense of Conspiracy to Commit a Felony in Count One and in Count Two with the offense of Robbery.

HISTORY OF CASE—OFFICIAL COURT FILE

The defendant appeared before the Small Claims-Magistrate Court on July 9, 1970, was advised of his rights and arraignment was set for July 20, 1970. On this latter date the defendant appeared in Court with privately retained counsel, waived the formal reading of the Information, entered a plea of not guilty, the case was set down for jury trial and bond was set in amount of $100,000.00. The State furnished a list of witnesses, statement of particulars and on October 19, 1970 private counsel was allowed to withdraw his representation of the defendant. The defendant was advised to speak with a representative of the Public Defender's Office.

On October 27, 1970 the defendant was before the Court, adjudged insolvent within the meaning of the law, the Public Defender of the 15th Judicial Circuit, in and for Palm Beach County, Florida was appointed to represent the defendant, the case remained set for trial during the week of November 2, 1970.

On this latter date, pursuant to a stipulation of counsel, the case was continued and reset for trial the week of February 1, 1971.

On November 30, 1970 defense counsel moved the Court for a Preliminary Hearing, the same was granted and held on December 30, 1970 and the Court found probable cause to have the defendant stand trial.

On February 1, 1971 defendant appeared in Court with the Public Defender, Thomas C. Matevia, and the case proceeded to jury trial. The exclusionary rule relating to witnesses was invoked and upon the conclusion of the State's case in chief defense counsel moved for Judgment of Acquittal which was denied, after which the defense presented its six defense witnesses, including defense counsel's motion for mistrial which was denied, and ultimately the jury returned its verdicts of guilty as to each count. The jury was polled at the request of defense counsel, acknowledged the accuracy of their verdicts, adjudication of guilt was withheld by the Court and a Presentence Investigation ordered. Scheduled sentencing was passed several times at the request of the Public Defender and on August 11, 1971 the Court granted motions for taking post-trial depositions.

On September 24, 1971 the defendant was sentenced to the Division of Corrections at hard labor.

On September 27, 1971 defendant appeared before the Court for correction of sentence which was accomplished

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and on October 8, 1971 defense counsel filed a Motion to Vacate and Set Aside Judgment which was dismissed without an evidentiary hearing on October 18, 1971.

On November 4, 1971 Notice of Appeal was filed by the defendant and the same was dismissed upon the Appellee's motion to dismiss on April 4, 1972.

On April 26, 1972 Motion to Vacate Judgment and Sentence was filed by the Public Defender's Office. The same was dismissed by this Court on August 2, 1972 without an evidentiary hearing and on August 9, 1972 Notice of Appeal was filed.

On January 31, 1973 the Appellate Court entered its Order Reversing the Trial Court and Mandate was entered by said Court on March 5, 1973. The cause came on for evidentiary hearing on March 15, 1973. At the conclusion of the evidentiary hearing the Court reserved ruling to enter a written order pursuant to the provisions of Rule 3.850.

ISSUE NO. 1

Whether this Court may review the allegations set forth in the Motion to Vacate and Set Aside Judgment and Sentence under consideration, together with the Official Court Files and rule upon the same to determine whether or not the petitioner is entitled to an evidentiary hearing considering the Order dated January 31, 1973 of the Fourth District Court of Appeal and its Mandate issued March 5, 1973?

The Order of the Fourth District Court of Appeal of the State of Florida dated January 31, 1973 provides as follows:

> "Appellant's Rule 3.850 Petition was denied without an evidentiary hearing. From the appellate presenta-

> tion it appears to be conceded and without dispute that this was error. . . Accordingly, the appealed order should be reversed and the cause remanded with respectful instructions to appoint new counsel for appellant . . . and to afford appellant an evidentiary hearing upon the merits of his petition.
>
> Reversed and Remanded, with instructions."

The Mandate of the Fourth District Court of Appeal of the State of Florida dated March 5, 1973 provides as follows:

> "To The Honorable, the Judges Of: Circuit Court of the Fifteenth Judicial Circuit for Palm Beach County. . . You are hereby commanded that such further proceedings be had in said cause as ought to be had, the said Order of the said Circuit Court notwithstanding."

At the conclusion of the petitioner's presentation of evidence during the course of the evidentiary hearing counsel for the State urged this Court to deny the petition upon the pleadings upon the grounds that the State of Florida was in error when it, in the Appellate Court, confessed error and the Appellate Court's remand as set forth above, did not mean that this Court was under an obligation to hold an evidentiary hearing unless upon further consideration of the pleadings the petitioner would be entitled to one as a matter of law.

This Court rules as a matter of law that the language set forth in the Appellate Court's Opinion is clear and unambiguous: "and to afford appellant an evidentiary hearing upon the merits of his petition." The Appellate Court mandating the evidentiary hearing upon the merits of the petition under consideration precludes this Court

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from considering the disposition of this case upon the pleadings and the State's oral motion to dismiss the same thereon must be denied.

In making the above ruling this Court has not overlooked the pronouncements of the Supreme Court of the State of Florida wherein it has held:

> " 'Applications for new trial upon the ground of newly discovered evidence are looked upon by the courts with distrust and disfavor, and are granted only under the following restrictions: (1) The evidence must have been discovered since the former trial; (2) the party must have used diligence to procure it on the former trial; (3) it must be material to the issue; (4) it must go to the merits of the cause, and not merely to impeach the character of a witness; (5) it must not be merely cumulative; (6) it must be such as ought to produce on another trial an opposite result on the merits. The party applying must make his vigilance apparent, for if it is left even doubtful that he knew of the evidence, or that he might, but for the negligence, have known of and produced it, he will not succeed in his application.'
>
> The newly discovered evidence upon the ground of which a new trial was sought was cumulative in its nature and merely sought to contradict one of the state witnesses." 66 So. 424, Williams v. State. (1914)
>
> "The provision of the rule, by its literal terms and apparently under uniform construction in the federal courts, does not eliminate the basic requirement that such motions set forth facts, rather than conclusions, showing the basis of relief in order to warrant a hearing to determine the truth or falsity of such facts. The most liberal of our decisions regarding sufficiency

of allegations in habeas corpus, preceding the current rule, support this minimum requirement." State v. Barton, 194 So.2d 241 (1967)

ISSUE NO. 2

Whether Court appointed counsel's inadequate investigation relating to out-of-state alibi witnesses who were not brought forth at the time of trial denied the petitioner effective assistance of counsel and due process of law so as to entitle the petitioner to the relief he seeks in his petition.

The evidence submitted to this Court relating to this issue is not limited to the testimony received in Court at the evidentiary hearing but includes all the documentary evidence which included eight post-trial depositions, the trial transcript, photographs, pretrial notes from the Public Defender's Office contained in their files, other exhibits which were marked for identification and admitted into evidence during the course of the hearing, together with a stipulation of respective counsel that the Court could consider anything contained in the entire court file.

The Court, based upon the above, makes the following Findings of Fact:

FINDINGS OF FACT

A. *Pretrial*

On July 20, 1970 the defendant, David Rahming, was in Court for arraignment purposes and was represented by private counsel. A plea of not guilty was entered and the case was set for jury trial during the week of November 2, 1970 and the local motion rule was invoked. Bond was set in the amount of $100,000.00.

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Two days later the State filed its list of witnesses and a bill of particulars. On September 25, 1970 defense counsel filed a motion to withdraw which was granted on October 19, 1970 at which time the defendant was advised to talk to the Public Defender's Office.

On October 27, 1970 the defendant was adjudged insolvent within the meaning of the law, the Public Defender's Office was appointed to represent him and the case remained set for trial during the week of November 2, 1970.

On that date respective counsel stipulated for a continuance and the case was reset for trial during the week of February 1, 1971.

On November 30, 1970 the Public Defender's Office moved the Court for a preliminary hearing which was held on December 30, 1970 wherein probable cause was found to hold the defendant for trial. The Public Defender's Office knew prior to said preliminary hearing and both the defense and State were put on notice at said preliminary hearing the main defense would be that of alibi, in that, the said defendant claimed to have been in Alabama on March 15, 1970 with Richard Haddox.

The State made no demand for Notice of Alibi pursuant to Criminal Rule of Procedure 1.200.

The Public Defender, on December 31, 1970 moved the Court for speedy trial. The investigator for the Public Defender's Office, upon learning of the defense was advised by the defendant that Richard Haddox was a witness to establish the alibi and to provide the names of other persons

which would be helpful; said investigator learned that both the defendant and Richard Haddox were arrested in Alabama.

Pursuant to the above information the investigator learned through Mr. Haddox' mother the name of Mrs. Gayle and her address and telephone number in Alabama. He called Mrs. Gayle in Alabama and being unsuccessful with the first call, left a message for the telephone call to be returned to their office which was done. However, the investigator did not personally talk with Mrs. Gayle. All information was conveyed to trial counsel.

Trial counsel personally talked to David Rahming prior to trial relating to the alibi witnesses and ascertained the names of Charlie Washington, George Rahming and a girl friend and advised his investigator to call the Alabama witness Mrs. Gayle relating to the trial, however, the investigation revealed that said witness was ill and not willing to come to Florida.

Defense counsel did not file a motion pursuant to Criminal Rule of Procedure 1.190 (1) to perpetuate testimony for trial.

The calendar was sounded on the trial date as set; defense counsel felt he was ready for trial and so announced to the Court.

B. *The Trial*

On February 2, 1971 the cause was called up for trial and defense counsel announced ready as did the State. At the conclusion of the State's case in chief defense counsel moved for Judgment of

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Acquittal which was denied and the defense called the following witnesses to testify as to the defense of alibi: George Rahming, Charlie Mae Washington, Inez Lorrey, Richard Haddox and the defendant, David E. Rahming.

Upon the conclusion of all evidence defense counsel renewed his motion for Judgment of Acquittal which was denied and ultimately the jury returned its verdict of guilty.

George Rahming testified: That the defendant and Richard Haddox left for Alabama on March 6 or 7 to visit Richard Haddox' aunt, however, he did not go with them.

Charlie Mae Washington testified: That Richard Haddox and the defendant left for Alabama during the first week of March and although she did not accompany them she did later travel to Alabama and actually saw the defendant in Alabama on Easter Sunday. That between the time the defendant left and Easter Sunday she had talked to both Richard Haddox and the defendant on the telephone from Alabama. The approximate date of one collect call was on the 15th day of March.

Inez Lorrey testified: That Richard Haddox and the defendant left town and that the defendant had called Maryanne and that the call was a collect call from outside the State of Florida.

Richard Haddox testified: That he and the defendant left Riviera Beach, Florida, on the 7th or 8th of March, 1970 and ultimately arrived in Alabama and stayed at the LaGrand Hotel and

that both he and the defendant had visited with Mr. Haddox' aunt Mrs. Gayle. Then they traveled to New Orleans, then traveled to Atlanta, Georgia, then to Macon, Georgia and then returned to Alabama arriving there the early morning hours of the 15th and stayed at the LaGrand Hotel and again visited Mrs. Gayle.

He could recall said date because it was on the 16th that they were arrested and confined in Alabama. He and the defendant were in Alabama the entire day of the 15th and on the 16th they began to return to Florida when they were arrested. They remained in jail for a week or two. Charlie Mae talked to them in Alabama.

The defendant, David Rahming, Jr., testified: That on March 15, 1970 he was in Mobile, Alabama, living at the LaGrand Hotel with Richard Haddox. That he left Riviera Beach, Florida, about the 7th or 8th of March with Richard Haddox and they visited his aunt and went on to New Orleans and returned to Mobile, Alabama. This was on the 15th of March and he and Richard Haddox checked into the LaGrand Hotel and he could recall the same because on March 16 he was arrested with Richard Haddox in Bay Minette, Alabama and charged with Grand Larceny.

He further testified he called his girlfriend on the 15th and sent her some money by Western Union. That Charlie Mae came to see him in Alabama and he confirmed the testimony of Richard Haddox concerning the trip to and from Alabama and their whereabouts on March 15, that being, in the State of Alabama.

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James L. Hegert testified: That while the trial was in progress, as a representative of the Public Defender's Office, he made long distance telephone calls to Alabama.

C. *Post-Trial Evidence*

The deposition of Mrs. Bennice Gayle whose address is in Mobile, Alabama, testified that the defendant was in Mobile, Alabama between the 14th and the 17th of March, 1970, with Richard Haddox and on deposition picked out the defendant's picture. That the two men had been at her house a day or so before they were arrested.

On the second deposition of the same witness she testified that prior to trial no one had ever shown her any photographs of the defendant, and again picked out the defendant from a picture submitted to her at the said deposition.

The deposition of Mrs. Philonese Dean, who is manager of the LaGrand Hotel in Mobile, Alabama, testified that on March 15, 1970 Richard Haddox was registered at the hotel on that date for one day and that prior to trial she had not been contacted. On viewing photographs she selected two which looked familiar to her, one being the picture of the defendant but could not state when or where she might have seen the individual.

The deposition of Sheriff Taylor Wilkins reflects the defendant was arrested at 2:25 p.m. on March 16, 1970 and the defendant was released on March 31, 1970 by order of Court and he had not been contacted prior to the taking of his deposition by anyone.

The deposition of Jessie Evans, who is a maid at the LaGrand Hotel, on viewing photographs, could not identify anyone.

The deposition of Leo C. Gayle, the husband of Mrs. Gayle, testified his nephew, Richard Haddox, did come to his home in March of 1970 and had a friend with him. He believed the day to be that of March 13, the Friday before the two men were arrested on March 16. However, on viewing photographs he could not identify the defendant.

The deposition of Laynette Gayle, upon viewing photographs, could not identify the defendant, however, Richard Haddox was in Alabama and had a friend with him prior to the arrest in Alabama. The witness could not specify what period of time transpired between seeing Mr. Haddox and his friend and the date of the arrest.

The deposition of Tracy Gayle reflects prior to trial she never saw any photographs and that her cousin was at her house around Easter time with a friend named David and upon viewing photographs selected the wrong photograph, a person other than the defendant. Later she testified it could have been the defendant's picture and on comparing the two pictures testified that she could not positively identify either or both.

D. *Evidentiary Hearing*

The defendant, David Rahming, immediately upon being contacted by the representative of the Public Defender's Office advised that office of his defense of alibi as he claimed to be in Alabama on the day in question, the hotel at which he stayed

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and his arrest with Richard Haddox the day after the robbery.

Pursuant to this information the Public Defender's Investigator learned the name, address and telephone number of Mrs. Gayle in Alabama and called her on the telephone, however, he, himself, never spoke to the witness. The best information he had received is the witness could not identify the defendant by name. No photographs were ever sent to the witness or any witness in Alabama concerning the identification of the defendant, David Rahming, in Alabama on the date the robbery occurred. That through conferences with the defendant and Richard Haddox, alibi witnesses were found and conferences held by trial counsel prior to trial with Richard Haddox, Charlie Washington, George Rahming, defendant's girlfriend and the defendant himself, and each testified at trial relating to the defense of alibi.

Immediately prior to and during the trial, trial counsel with the meagre information he had at his disposal concerning the possible testimony of the Alabama witnesses made the decision to proceed to trial and not seek a continuance utilizing the witnesses who were present and ultimately testified.

Telephone calls were made by the Public Defender's Office to the Alabama witnesses during the course of the trial which were of no avail to trial counsel. That the change of trial counsel from one division to the other is of little consequence because neither attorney ever talked personally to the witnesses in Alabama except for Richard Haddox who did in fact testify at trial.

The preparation prior to trial relating to the Alabama witnesses by defense counsel, except for Richard Haddox, was not adequate but the preparation prior to trial of the alibi witnesses other than those residing in Alabama was adequate and trial counsel's conduct during the trial was competent and thorough.

The efforts of the Public Defender's Office in preparing the case for trial and the efforts of trial counsel during trial were not substandard so as to reduce the defendant's trial to a farce, a mockery of justice, perfunctory, sham, pretense, or in bad faith so as to deny the petitioner effective assistance of counsel and due process of law as set forth in the Constitutions of the State of Florida and the United States of America.

LAW

In the case of Simpson v. State the Florida Appellate Court set forth the general rule of law as follows:

"Our next inquiry must be into the factual requisites necessary for determining when, and under what circumstances, a court may find that an indigent accused has been, in effect, denied his right to counsel by virtue of the fact that such counsel was incompetent. It goes without saying that the test is not the result or outcome of the litigation.

Inasmuch as Rule 1 is an adoption of 28 U.S.C.A. §2255, the Federal cases in this area are most helpful and entitled to our consideration.

In Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962), the court set out the proper method for resolving this issue: '* * * The constitutional right

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to the effective assistance of counsel does not vest in the accused the right to the services of an attorney who meets any specified aptitude test in point of professional skill. And common mistakes of judgment on the part of counsel, common mistakes of strategy, common mistakes of trial tactics, or common errors of policy in the course of a criminal case do not constitute grounds for collateral attack upon the judgment and sentence by motion under the statute. 28 U.S.C.A. §2255. It is instances in which resulting from the substandard level of the services of the attorney the trial becomes mockery and farcical that the judgment is open to collateral attack on the ground that the accused was deprived of his constitutional right to effective assistance of counsel.'

Now that we have discovered what would amount to a deprivation of counsel by means of incompetence we must consider what specific activity on the part of a lawyer would result in a trial becoming a 'mockery or farcical' so that such an allegation, if proven, would constitute grounds for granting a new trial.

In Mitchell v. United States, 104 U.S. App.D.C. 57, 259 F.2d 787, 794 (1958), cert. den. 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed. 2d 86, Judge Prettyman writing for the court, stated: 'If a movant under Section 2255 makes no allegations of ineffectiveness or incompetence of counsel, save in matters normally within the realm of counsel's judgment, he is not entitled to a hearing. Under such circumstances a hearing would be useless, an inexcusable waste of time, energy and money, because even if the movant proved what he alleged he would not be entitled to relief.'

In regard to what constitutes 'judgment' the court said: 'Trial counsel must make many decisions of

an almost infinite variety in the course of a criminal trial: whether to advise a plea to a lesser offense; whether to object; whether to offer a witness of possibly doubtful credibility or with a criminal record; whether to risk crystallizing the view of the judge at that point by a motion for directed verdict before the defense testimony is in; whether to advise the defendant to take the stand and subject himself to cross examination; how to argue the case to the jury; whether to advise the defendant not to go to trial at all but rather to rely upon the mercy of the court. All these and more are practical questions and very real questions. Bad judgment, or even good but erroneous judgment, may result in adverse effects. These are simple facts of trial; they are not justiciable issues.' " 259 F.2d 792. Simpson v. State 164 So.2d 224. See also Meinsen v. State 240 So.2d 188 and Platt v. Wainwright 208 So.2d 666.

In the case of Williams v. Beto the Appellate Court was confronted with a similar situation as is this Court and admittedly said case is somewhat distinguishable.

"It is next complained that Lyle did not personally interview the operators of the Texas Hotel, that this was a fatal lack of investigation. The record shows that he did talk with his law partner, Mr. Lovell, about it for approximately an hour, during which he found out that these people instead of assisting Williams would contribute to his conviction. . . We cannot say that an attorney is negligent, or reckless, or lacking in devotion when he relies on direct information from his law partner of long standing concerning a case that partner had already tried, especially when there is not a word attacking the reliability of that attorney. This is particularly true in this case where

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> the witnesses under discussion were not offered at the habeas corpus hearing to prove they would have testified in behalf of the defendant had they been called in the state court."
>
> "It has been held that lack of effective representation by counsel means representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it. . . It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation." 354 F.2d 698

It is the law of Florida that:

> "We adopt the federal rationale which holds that the competence of counsel cannot be determined by the amount of time he is shown to have spent with the accused. An allegation that counsel did not interview the accused prior to trial, standing alone, does not constitute grounds upon which relief pursuant to CrRP 1.850 can be granted." Williams v. State 215 So.2d 615.

In the case of Goforth v. U.S. the Appellate Court held as follows:

> "The record further discloses that counsel was appointed to represent Goforth on the day of the trial and immediately prior to the selection of the jury. . . The trial was then delayed for a sufficient time in which to locate a lawyer in order to appoint him as counsel for Goforth. After such appointment was

made the counsel and Goforth had only five to fifteen minutes to confer before the trial was commenced. . . This attorney testified that he was not familiar with the substantive nature of the charges against Goforth at the time the trial commenced and did not feel he had an opportunity to make an effective investigation of the case or research the law prior to trial and would have spent considerable time in preparing for trial if he had an opportunity. He admitted that he was not prepared to advise his client on propriety of moving for a severance of the case and left the decision not to so move up to counsel for the other defendants. . . That Goforth's attorney conferred with him (Goforth) and was fully informed as to his defense and witnesses; and that he was advised of his right to appeal the conviction. On the basis of these findings, the court concluded as a matter of law that Goforth was competently and effectively represented by his court appointed counsel at all stages of the proceeding and his rights were not prejudiced by the appointment of counsel immediately prior to the start of his trial.

The Sixth Amendment provides, among other things, that 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. . .' 'It is a fundamental principle that an accused has a constitutional right to the assistance of counsel throughout the trial proceedings. . .'

This constitutional guaranty means effective assistance as distinguished from bad faith, sham, mere pretense or want of opportunity for conference and preparation. . . But success in the outcome of the criminal prosecution is not the test of effective assistance of counsel. . . It is instances in which resulting from

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the substandard level of the services of the attorney that the trial becomes mockery and farcical that the judgment is open to collateral attack on the ground that the accused was deprived of his constitutional right to effective assistance of counsel." 314 F.2d 868.

The Florida Supreme Court in the case of Fuller v. Wainwright held:

"Petitioner further says that he was denied the right of effective assistance of counsel and alleges that he was visited only twice by his lawyer prior to trial. This does not in itself establish incompetent representation. . . Furthermore, his complaint that his court-appointed counsel failed to subpoena witnesses for his defense is without merit. Failure of counsel to call witnesses on behalf of the defense is a matter of personal judgment exercised by defense counsel and is not a ground of collateral attack. . . Petitioner next contends that the State used perjured testimony in obtaining the conviction, but he does not allege that the prosecuting attorney had any knowledge of this allegedly perjured testimony. . . Perjury of a witness in a criminal trial does not form the basis of post-conviction relief unless the prosecuting attorney knew at the time such testimony was used that it was untrue." 238 So.2d 65. See also, Barber v. State wherein the Appellate Court held:

"Appellant filed a motion to vacate judgment and sentence, alleging as the basis thereof that his conviction was supported solely by the testimony of two witnesses, each of whom had made post-trial extrajudicial statements admitting that their trial testimony was not true. . . We find a long line of cases squarely holding that the writ would not issue on the ground that a witness had testified falsely at trial regarding

a material issue absent a showing that such false testimony was induced by, or at the time known to, one of the prosecuting officers." 257 So. 2d 581.

The law of Florida relating to the granting of a new trial upon the grounds of newly discovered evidence is set forth, supra, in the case of Williams v. State, 66 So. 424 and was reiterated in the case of Florida East Coast Railway Company v. Knowles, 67 So. 122.

In the case of Diamond v. State the Appellate Court was confronted with post-conviction relief petition based upon the ground of newly discovered evidence. In this case the situation was as follows:

"The newly discovered evidence was a written statement given to the police by one Gruosso, the driver of the car in which the appellant was a passenger at the time the police stopped the car and placed both Gruosso and appellant under arrest on the charge of possession of marijuana. After they were arrested, both Gruosso and appellant were taken to the police station, but appellant was released shortly thereafter whereas Gruosso remained and gave the police a statement which was then reduced to writing and signed by Gruosso. Such statement was later placed in the prosecutor's files but its existence was unknown to appellant at the time of his trial. The substance of what Gruosso had said in the written statement was essentially exculpatory of appellant, as Gruosso's statement corroborated appellant's own testimony to the general effect that appellant was not aware that the automobile contained marijuana until, at a time just prior to the car being stopped by the police, Gruosso told him of the fact and asked him to get the marijuana off the backseat and throw it out the window.

That which must be shown in support of a motion for new trial on the ground of newly discovered evidence is set forth in the syllabus in Florida East Coast Railway Co. v. Knowles. . . Included in the various requirements is that such evidence *must not be merely cumulative and must be such as ought to produce on another trial an opposite result on the merits.* The written statement was, of course, cumulative in the sense that had Gruosso testified at the trial in a vein similar to the written statement which he had given, such testimony would have merely corroborated appellant's own testimony. . . We have this view even though we feel that the written statement, had it been admissible, would clearly have been exculpatory in nature as to appellant rather than, incriminating as the trial court seemed to feel. . . But Gruosso was the only witness to whom the statement would have led. It is patent that the identity of Gruosso as a potential witness was known to appellant at all times, as were the facts which Gruosso related in his written statement (being the same facts to which appellant testified at trial). Thus, these facts were certainly not in the category of 'newly discovered' subsequent to judgment, and the nondisclosure of content of the written statement kept nothing from appellant which was not already fully known to him." 233 So.2d 418

The Supreme Court of Florida, on February 21, 1973, held in a Rule 3.850 motion, based upon the grounds of newly discovered evidence:

"Evidence connecting the 'Jacksonville Three' with this murder was initially discovered by an investigator for the court-appointed attorney for the 'Quincy Five' defendants, Smith and Figgers, after Keaton and Frederick had been convicted. The information was passed

by them to the Sheriff and the State Attorney and further investigation by the Sheriff and State Attorney resulted in the indictment of the 'Jacksonville Three.' Defendants, Keaton and Frederick, could not, with reasonable diligence, have discovered and produced upon their trial the new and material evidence."

* * *

"A new trial should be granted Dave Roby Keaton on account of the aforesaid newly discovered material evidence in order that he may be afforded a fair trial under the Constitutions of the United States and the State of Florida. He should have the opportunity to present this newly discovered evidence to a jury for its consideration on the question of his guilt or innocence as did his codefendant, David Charles Smith, Jr., who was acquitted." Keaton v. State, 273 So.2d 385.

The Fourth District Court of Appeal in the case of Nelson v. State (unreported as of this date), Case No. 71-1008, pursuant to a Motion for Post Conviction Relief held:

"The right of an indigent to appointed counsel includes the right to effective representation by such counsel . . . Although we are not able to formulate any verbal criteria that will define for all situations conduct which measures up to 'effective assistance', it may be said with reasonable assurance that the delivery of effective assistance requires the attorney involved to make a reasonable investigation into the facts of the case and to acquaint himself with the law pertinent to the facts. In addition, effective counsel should be free of any influence or prejudice which might substantially impair his ability to render independent legal advice to his indigent client."

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Based upon the Official Court File, all documentary and testimonial evidence submitted to this Court during the evidentiary hearing for Post Conviction Relief, together with the law set forth above, it is, upon consideration thereof,

ORDERED AND ADJUDGED defendant's Motion for Post Conviction Relief, be and the same is hereby denied.

DONE AND ORDERED this 12th day of April, 1973, at West Palm Beach, Palm Beach County, Florida.

/s/ Vaughn J. Rudnick
Vaughn J. Rudnick
Judge, Circuit Court, Criminal Division

(Seal)

copies furnished:

Honorable David Bludworth, State Attorney

David Roth, Esquire, attorney for petitioner

IN THE
DISTRICT COURT OF APPEAL OF THE STATE OF
FLORIDA FOURTH DISTRICT
JULY TERM 1974

CASE NO. 72-921.

DAVID EMANUEL RAHMING,
Petitioner,

v.

LOUIE L. Wainwright, Director,
Division of Corrections,
Respondent.

CASE NO. 73-526.

DAVID E. RAHMING,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Decision filed July 26, 1974.

Consolidated appeals from the Circuit Court for Palm Beach County; Vaughn J. Rudnick, Judge.

David Roth, of Cone Wagner Nugent Johnson & McKeown, West Palm Beach, for appellant.

Robert L. Shevin, Attorney General, Tallahassee, and Thomas M. Carney, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.
Affirmed.

WALDEN and DOWNEY, JJ., and FARRINGTON, OTIS, Associate Judge, concur.

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SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1975

THURSDAY, MARCH 13, 1975

CASE NO. 46,291

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

72-921

73-526

DAVID E. RAHMING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6) and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., ROBERTS, McCAIN, OVERTON and ENGLAND, JJ., concur

cc: Hon. Emmett J. Comiskey, Clerk

Hon. John B. Dunkle, Clerk

Hon. Vaughn J. Rudnick, Judge

Hon. Larry Klein
of Cone, Wagner, Nugent, Johnson & McKeown

Hon. Thomas M. Carney

* * * witness. They would have been able to get the motel records.

If this is true that they went to other motels, then there must be other motel records that could also have been gotten. When you begin to take the cumulative effect of what this alibi testimony was, it simply would have been far more substantial than what was presented to the jury, because what was presented to the jury was simply the fact that he was arrested the next day. We stipulated to that.

But I don't believe that I stipulated that he stayed in Mobile or anything else. There was no way to do that. So the answer to your question, based on all I have said, is there was no preparation in this case. There was no preparation with respect to alibi defense, and in my mind, there was simply no doubt that that would constitute ineffective assistance of counsel.

MR. ROTH: I have nothing further, Your Honor.

THE COURT: Counsel approach the bench before we start your cross examination.

(Discussion had before the bench.)

THE COURT: Let us proceed on with this witness and then we will recess for lunch.

Proceed with your cross examination.